SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 328

MARTIN E. SEGAL and LEON KARCHMER,
Petitioners;

v.

JAMES MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, Individually and on behalf of the Members of the National Maritime Union of America,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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June 29, 1970

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In The

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No.

Martin E. Segal and Leon Karchmer,

Petitioners,

v.

James Morrissey, Joseph Padilla, Ralph Ibrahim, Individually and on behalf of the Members of the National Maritime Union of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners Martin E. Segal and Leon Karchmer ("Segal" and "Karchmer") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on February 20, 1970.*

* Petitioners Segal and Karchmer also support the petition for a writ of certiorari (October Term, 1969 No. 1648) which has been filed by petitioners Joseph Curran, Shannon Wall, William Perry and Abraham Freedman on the grounds set forth therein.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, which is reprinted in Appendix "F" hereto, is reported at 423 F.2d 393 (1970). The memorandum decision of the District Court of the Southern District of New York, which is reprinted in Appendix "B" hereto, is reported at 302 F. Supp. 32 (1969).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered February 20, 1970. Timely petitions for rehearing and rehearing *en banc* by defendants Martin E. Segal and Leon Karchmer were denied by orders entered March 31, 1970. (The orders denying the petitions for rehearing and rehearing *en banc* are reprinted in Appendix "H" and "I", respectively.) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented For Review

1. Where in an action brought under § 501 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501, against certain union officers and trustees of a union pension plan for allegedly acting in contravention of the union's constitution by amending a union pension plan to include as beneficiaries supervisory employees of the union who were not otherwise receiving pensions incident to their employment with the union, while all other employees of the Union and its officers were receiving such benefits, and where such action was brought eight years after the pension plan amendments—which were well-publicized and a matter of public record—and where numerous pensions have been awarded under the pension plan over the past eight years to supervisory employees of the union and have accrued for others, and where there

is no evidence that any of the defendants personally benefited from the disputed pension plan amendments:

(A) Did the District Court err in substituting its own interpretation of the union's constitution for the reasonable interpretation consistently placed upon the constitution in good faith by the union's officers?

(B) Did the District Court err in granting the plaintiffs' motion for summary judgment, thus depriving the defendants of a trial as to the actual intent of the drafters of the union constitution and of the union membership, when two interpretations of the union's constitution were reasonably possible—one favorable to the plaintiffs and the other to the defendants—and the union membership recently voted overwhelmingly to adopt the interpretation of the union officers?

(C) Did the District Court err in granting the plaintiffs summary judgment when material factual issues of laches existed as to when plaintiffs became aware of the pension plan amendments and why they delayed bringing this lawsuit until eight years after the pension plan amendments became public knowledge?

(D) Did the District Court err in granting summary judgment against defendant, Martin E. Segal, one of the trustees of the pension plan, who was not a party to this action at the time plaintiffs made their motion for summary judgment or at the time of the hearing of said motion, and was such error cured by the fact that defendant Segal participated in a subsequent motion for reargument which was denied?

(E) Did the District Court err in holding that defendants Segal and Karchmer, trustees of the union pension plan, whose only connection with the union was defined by the trust agreement and who

are neither officers nor employees of the union, are subject to the fiduciary duties established by 29 U.S.C. § 501 when such trustees are already subject to the well-established fiduciary obligations imposed on them by their trust agreement and state law?

(F) Did the Court of Appeals err in holding that certain amendments to the union's constitution, which were proposed by the union's officers in order to provide the constitutional authority which the District Court had found lacking, to protect the pension benefits which had accrued for some forty supervisory employees who are relying on the availability of these funds at retirement, and to validate past pension awards to other employees, were "exculpatory" within 29 U.S.C. § 501?*

II. Did the Court of Appeals for the Second Circuit violate the procedure established by this Court in Rule 35(b) of the Federal Rules of Appellate Procedure by not giving Judge John A. Danaher, Senior Circuit Judge of the District of Columbia Circuit, sitting by designation, the opportunity to request a vote on the suggestion filed by defendants that a rehearing of the case be held by the Court of Appeals sitting *en banc*, even though Judge Danaher was a member of the original three Judge panel which heard and decided the case?

Statutory Provisions Involved

The statutory provisions involved are Sections 3(q) and 501(a) and (b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 402(q), 501(a) and (b); Rule 56 of the Federal Rules of Civil Procedure;

* Petitioners Segal and Karchmer incorporate by reference, as if fully set forth herein, the reasons given at pp. 13-18 of the petition of petitioners Curran, Wall, Perry and Freedman (October Term, 1969 No. 1618) for the granting of the writ as to this question.

and Rule 35(b) of the Federal Rules of Appellate Procedure. These provisions are set forth in Appendix "A".

Statement of the Case

In 1951, the Constitution of the National Maritime Union (NMU) was amended by approval of the membership to give the National Council of the NMU power, subject to membership approval, to establish the salaries and pensions of employees and officers of the NMU. (Joint Appendix pp. 25a-26a)* From 1951 to 1960, the National Council exercised the power provided in Article 15 § 8 of the 1951 Constitution by establishing pensions in collective bargaining agreements with other unions covering NMU rank and file employees (Appendix pp. 28a-29a). Also pursuant to Art. 15 § 8 of the 1951 Constitution on December 29, 1952, a Trust Agreement was entered into between the NMU and defendant trustees Segal and Karchmer and Herman E. Cooper (defendant Abraham E. Freedman being the successor trustee to Cooper), establishing a pension plan for officers of the NMU ("NMU Pension Plan") (Joint Appendix p. 26a). By 1961, then, only one category

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* The 1951 amendment read as follows:

ARTICLE 15

SALARIES OF OFFICERS

Section 1—Salaries and Expenses: The National Council . . . is empowered, subject to approval of the membership, to set from time to time the actual salaries and daily expenses of all Union officers and employees. . . .

SECTION 8—Pension and Welfare: The National Council, subject to approval of the membership, is empowered to make adequate and appropriate provisions for pensions, welfare and similar benefits for officers and employees of the Union.

of NMU employee was left without any pensions—namely, supervisory employees.*

To remedy this oversight, on October 28, 1961 the National Office** authorized an amendment of the NMU Pension Plan to include within its coverage eight supervisory employees, including defendant Perry (Joint Appendix pp. 28a-29a). The National Office authorized these amendments on the basis of its interpretation of a 1960 Constitutional Amendment, Art. 8 § 11(a) of the 1960 Constitution,*** which had given the National Office full power to establish all employee "salaries" without membership approval, concluding that the power to fix the "salaries" of employees included the power to establish their pensions. (Joint Appendix p. 29a) In 1964 the NMU Pension Plan was further amended to include all full-time NMU

* In this respect, the statement by the Court of Appeals at 423 F.2d at 395 n.2, (p. 20A n. 1a. *infra*) is clearly erroneous. There is ample uncontradicted evidence in the record to show that none of the NMU supervisory employees brought under the Plan in 1961 had any previous pension coverage in collective bargaining agreements between the NMU and any other union. (Joint Appendix pp. 28a-29a, 39a). This was explicitly recognized by Judge Danaher in his dissent, 423 F.2d at 401, 402 (pp. 30A-31A, 33A *infra*). Moreover, any payments which defendant Perry received under the NMU Deep Sea Pension Plan were received by him in his capacity as a seaman and not in his capacity as an NMU employee. The moneys for the Deep Sea Pension Plan are supplied by the various employers with whom the NMU bargains as a collective bargaining agent for its seamen members, and do not come out of the NMU treasury. (Joint Appendix p. 84a)

** The National Office of the NMU, which meets weekly consists of the National President, National Secretary, Treasury, three Vice-Presidents and three National Representatives.

*** Article 8, § 11(a) of the 1960 Constitution read as follows:

> The National Office . . . shall fix the salaries of all technical, clerical and administrative personnel as may be required for the effective administration of the Union's affairs.

supervisory employees, in addition to those already included in 1961. (Joint Appendix pp. 29a-30a) The Pension Plan amendments of 1961 and 1964, as well as annual reports on the Plan, were filed with the Department of Labor and were a matter of public record and were well-publicized among the union membership. (Joint Appendix pp. 85a-87a) Under the NMU Pension Plan, from 1961 to the District Court's order, pension benefits had either accrued for or been paid out to approximately forty-seven supervisory employees. (Joint Appendix pp. 62a-63a) For example, a former executive bookkeeper retired in July 1963 and—at least before the District Court's order—was receiving a modest monthly pension from the Plan of $131.44 for a ten-year term; in August, 1964, a former maintenance supervisor retired after 20 years of service and had been receiving a monthly pension of $412.88. (Joint Appendix p. 86a) And approximately forty supervisory employees have had their accrued benefits wiped out by the District Courts' order. (Joint Appendix pp. 62a-63a)

On February 4, 1969, almost eight years after the 1961 Pension Plan amendments, the plaintiffs commenced this lawsuit under 29 U.S.C. § 501 claiming that the amendments were in violation of the 1960 NMU Constitution and seeking an accounting, repayment of all moneys and a permanent injunction restraining all future payments. (Joint Appendix pp. 1a, 8a-12a)

On or about March 19, 1969, plaintiffs cross-moved for summary judgment, defendants Curran, Wall and Perry having previously moved for similar relief. (Joint Appendix pp. 24a, 41a). The motion and cross-motion were heard before the District Court on March 26, 1969. Defendant Segal was not served with a copy of the summons and complaint until April 11, 1969. (Joint Appendix p. 2a).

On July 11, 1969 the District Court granted the cross-motion of plaintiffs for summary judgment against all the defendants, including defendant Segal, after denying the motion of defendants Curran, Wall and Perry to reargue on July 3, 1969. (The orders of the District Court entered on July 11, 1969 and July 3, 1969 are reprinted as appendices "C" and "D", respectively.)

In denying the motion to reargue on July 3, the District Court also considered the affidavit of defendant Segal in which the Court was informed that defendant Segal had not been subject to the Court's personal jurisdiction at the time of the hearing of the motion for summary judgment and therefore had not had an opportunity to present his case. (Joint Appendix pp. 58a-59a) The District Court considered the affidavit but did not grant defendant Segal's request to reargue. (Appendix "D" *infra*)

In an effort to remedy what the District Court had found to be a lack of constitutional authorization for the 1961 NMU Pension Plan amendments, to protect the pension benefits which had accrued under the Plan since 1961 for supervisory employees who were relying on receiving these benefits at retirement and to validate past pension payments, the union set in motion the steps to amend its constitution expressly to grant pension rights to employees including all those already granted pensions (Joint Appendix pp. 81a-82a). On June 4, 1969 the membership overwhelmingly approved the amendments (Joint Appendix pp. 95a-96a) but before the amendments could be implemented plaintiffs sought to have them declared "exculpatory" within 29 U.S.C. 501(a). The District Judge ruled that the amendments were not exculpatory but obviously had as their purpose the inclusion of non-officer employees in the Pension Plan. (Appendix "E" *infra*)

The defendants appealed from the District Court's decision holding that the 1961 NMU Pension Plan amendments were not constitutionally authorized and plaintiffs appealed from the District Court's determination that the Constitutional amendments of June 4, 1969 were not exculpatory within 29 U.S.C. § 501(a). The Court of Appeals in a split decision affirmed the District Court's determination that the Pension Plan amendments violated the NMU Constitution and reversed the District Court's decision that the Constitutional amendments were not exculpatory. Judge Danaher dissented on all grounds. (The judgment of the Court of Appeals entered on February 20, 1970 is appended as Appendix "G".)

On March 13, 1970 defendants Segal and Karchmer filed a petition for rehearing and rehearing *en banc*, both of which were denied on March 31, 1970. (Appendices "H" and "I" *infra*) Judge Danaher voted to grant the petition for rehearing but, since he was not an active Circuit Judge of the Second Circuit, he was not given an opportunity to request a vote on the petition for a rehearing *en banc*. On April 9, 1970 the defendants made a motion for reconsideration on the grounds that the Court of Appeals' failure to afford Judge Danaher this opportunity violated Rule 35(b) of the Federal Rules of Appellate Procedure. On April 24, 1970 the Court of Appeals denied the motion without opinion. (The order denying the motion for reconsideration is reprinted in Appendix "J" hereto.)

REASONS FOR GRANTING THE WRIT

I.

The central issue involved in this case—whether a federal court in a suit under 29 U.S.C. § 501 may substitute its own interpretation of a union's constitution for the reasonable interpretation of the union's own officers—is an issue of importance to federal courts reviewing the actions of union officers under 29 U.S.C. § 501, and to the internal management of unions throughout the United States and is closely related to a question upon which this court recently granted certiorari on May 25, 1970 in *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers* v. *Hardeman*, No. 1392, October Term 1969, a case arising under 29 U.S.C. § [redacted]. 412

At the heart of this case is the issue whether in an action under § 501 of the Labor Management Reporting and Disclosure Act a federal court may substitute its own interpretation of a union's constitution for the reasonable interpretation of the union's officers which has been consistently applied by them over the years in a well-intentioned effort to implement what they thought was the intent of the membership. It is an issue of paramount importance not only to federal courts in interpreting union constitutions under § 501 but its resolution is also vital to the administration of the thousands of unions throughout the United States. These unions are guided by men who, for the most part, have worked their way up through the ranks to officership; they are not lawyers skilled in strict statutory interpretation and construction. If they are deprived of the right to interpret their constitutions reasonably in a manner apparently acceptable to the membership over many years, and instead are held retro-

actively to the strict theory of legalistic construction applied by the District Court and a majority of the Court of Appeals here, which seems to sacrifice intent to an excessively literal reading, this could seriously impede the internal functioning of unions throughout the country and create extremely unjust results.

This case presents a clear example of this danger. The union officers here merely amended a union pension plan to provide pensions for supervisory employees of the union who were not otherwise receiving pension benefits. The union officers authorized such an amendment based on their interpretation of the constitutional provision giving them power to establish all employee "salaries" without membership approval. This construction is in accord with case law which recognizes that the term "salary" is broad and includes an employee's total compensation for work performed, including "pensions" and other fringe benefits, which are in effect deferred payments of salary. See e.g. *Bramley* v. *Baxter* 225 N.C. 691, 36 S.E. 2d 281 (1945); *Giannettino* v. *McGoldrick*, 295 N.Y. 208, 212, 66 N.E. 2d 51, 59 (1946); *Gordon* v. *Monaghan*, 309 N.Y. 336, 342, 130 N.E. 2d 882, 885 (1955); *Inland Steel Co.* v. *NLRB*, 170 F.2d 247 (7th Cir. 1948) *cert. den.* 336 U.S. 960 (1949). Moreover, as Judge Danaher recognized in his dissent, the 1961 Pension Plan amendments were in accord with the apparent intention of the union membership.

In adopting this interpretation of their constitution, none of the defendant officers personally benefited and, as for the trustees, Judge Bonsal specifically stated that the court was not questioning defendant Segal's good faith. (Joint Appendix p. 91a; p. 14A *infra*).* Yet despite this,

* There was in fact no evidence that any of the defendants acted in bad faith.

these defendants find themselves being sued for breach of fiduciary duties for merely extending pension benefits to a group of employees in accordance with what they reasonably considered to be the wishes of the membership and what they reasonably believed they had the power to do.

By the grant of summary judgment, they have been deprived of an opportunity of a trial of the issues of intent and laches which was clearly required on this record. A decision by this Court is appropriate to make clear that in the future union officers may interpret their constitutions reasonably without jeopardy under § 501, and without the risk of the substitution of the District Court's interpretation for their own, without even the opportunity of trial.

The importance of such issues has recently been recognized by this Court in granting a petition for a writ of certiorari in *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers v. George W. Hardeman* No. 1392, October Term, 1969 on the issue: "Whether a federal court in a Section 102 [29 U.S.C. § 412] proceeding reviewing an expulsion of a member by a union may apply a standard of review whereby the court substitutes its own factual findings and interpretations of the union's constitution and by-laws, for those of the union." It is respectfully submitted that this Court should grant certiorari in this case also so that the standard of interpretation to be applied under Section 501, as well as Section 102 of the Labor Management Reporting and Disclosure Act of 1959, will be more clearly defined, the duties of the District Courts in this general field may be performed with reasonable consistency and union officials and trustees may be protected in their right to act reasonably under their constitutions.

II.

Since the decision by the Court of Appeals affirming the District Court's grant of summary judgment to the plaintiffs is a departure from the principles in decisions of this Court, and conflicts in principle with decisions from other Circuits, restricting the use of summary judgment, this Court should exercise its power of judicial supervision to protect the right of defendants to a factual hearing.

This Court in *United States* v. *Diebold, Incorporated*, 369 U. S. 654 (1962) condemned the granting of summary judgment where contrary material inferences could be drawn from the underlying facts of a dispute:

> "On summary judgment the inferences to be drawn from the underlying facts contained in such materials [affidavits, exhibits, etc.] must be viewed in the light most favorable to the party opposing the motion. *A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible.*" 369 U. S. at 655. (emphasis added)

See also *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 743, 748 (1945) and *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620, 627 (1943). And in *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464, 467, 473 (1962) this Court reversed a grant of summary judgment since the case presented material issue of intent which could not be resolved as a matter of law.

A. The Factual Issue of the Intent of the Drafters of the Union Constitution and the Union Membership.

It is well established in cases from other Circuits involving the construction of written instruments that when language of a written instrument is susceptible to more

than one reasonable interpretation, summary judgment must be denied and a trial must be had to determine the intent of the parties of the instrument. See *e.g. Cram* v. *Sun Insurance Office, Ltd.*, 375 F.2d 670, 674 (4th Cir. 1967); *Socony Mobil Oil Company, Inc.* v. *Humble Oil Refining Co.*, 387 F.2d 155, 157 (10th Cir. 1967); *Severson* v. *Fleck*, 251 F.2d 920, 922 (8th Cir. 1958).

The National Office of the Union interpreted its power as established in Art. 8, § 11(a) of the 1960 Constitution to set employee "salaries" as including the power to establish pensions and on that basis amended the NMU Pension Plan to include "supervisory" employees. As discussed above, see p. 11 *supra*, this interpretation is amply supported by case law and was also supported by the past practice of the NMU in providing pensions to officers and non-supervisory NMU employees pursuant to Article 15, § 8, of the 1951 Constitution.*

The District Court and the Court of Appeals acknowledged that the word "salaries" as used in Article 8, § 11(a) of the 1960 Constitution could be interpreted to include "pensions" but stated that a "careful distinction" was made between the terms "pensions" and "salaries" in the NMU Constitution merely because Article 14 of the 1960 Constitution, which incorporated both terms, was labelled "compensation", rather than "salaries" 423 F.2d at 397; 302 F.Supp. at 35 (pp. 7A-8A, 24A *infra*). However, Article 14 of the 1960 Constitution was far removed from Article 8, and dealt with an entirely different subject matter.**

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* It is unreasonable to conclude that the NMU membership would choose to deprive supervisory NMU employees of pensions while at the same time giving its officers and rank and file NMU employees these benefits.

** Article 8 dealt with the powers of the National Office and Article 14 was concerned with the compensation of officers.

Moreover, given the loose and unskilled manner in which union constitutions are often drafted, it is highly unrealistic to conclude that the drafters of the NMU constitution intended to make such nice distinctions merely by labelling an Article with one word rather than another. Finally, since "salaries" and "compensation" are synonymous, *Treu* v. *Kirkwood*, 42 Cal. 2d 602, 268 P. 2d 482, 486 (1954); *Spearman* v. *Williams*, 415 P. 2d 597 (Okla. 1966); *Cook County* v. *Healy*, 222 Ill. 310, 78 N.E. 623 (1906), the use of one rather than the other indicates at most the personal predilection of one of the drafters and certainly does not deserve the far reaching significance accorded to it by the lower courts here. As Judge Danaher said in his dissent, if there be a danger in a too literal reading of Congressional statutes, how much more caution should be applied to the inartful expression of union drafters. More importantly, if union officers are to be held to such a strict construction of their constitutions, it could seriously endanger the internal workings of unions by placing impossible burdens on their officers, which clearly was not the intent of Congress, as this Court warned in *Wirtz* v. *Bottle Blowers Assn.*, 389 U. S. 463, 471 text, n. 10 (1968). See also *Gurton* v. *Arons*, 339 F. 2d 371, 375 (2nd Cir. 1964).

The recent NMU constitutional amendments, validating all past and future pension payments to NMU employees and passed by an overwhelming vote of the membership (Joint Appendix pp. 95a-96a), also support the reasonableness of the interpretation of the National Office. Similar reliance on practical construction as an aid in determining intent, (See *e.g. Pekar* v. *Local Union No. 181*, 311 F.2d 628, 636 (6th Cir. 1962) *cert. den.* 373 U. S. 912 (1963)) points in the same direction. The overwhelming vote by the NMU membership for the adoption of the recent amendments indicates that it has been the consistent intent

of the membership to provide pensions for *all* NMU employees no matter what their status. And the apparent acquiescence by the membership in defendants' interpretations over many years, until plaintiffs' challenge, strongly supports that conclusion.

It is clear therefore that there were sufficient facts underlying this dispute from which the lower courts could have drawn the inference that the interpretation of the National Office was reasonable. A trial of the issues was thus clearly required and summary judgment was improper. The decision below thus conflicts in principle with the decisions of this Court and those in other Circuits, cited above. It would seem desirable in the interests of consistency in the application of provisions for the useful but limited remedy of summary judgment not to deny the right to a full trial of important issues of the sort involved here, where the rights of many Union members and employees are directly affected and the rights of many others may be indirectly affected.

B. The Factual Issues of Plaintiffs' Laches

There are material factual issues as to the plaintiffs' laches which the Court of Appeals ignored in affirming summary judgment. There is abundant evidence that prejudice has resulted from the eight year delay of plaintiffs in bringing this suit. Pension benefits accruing over the years for approximately forty employees of the NMU who have relied on these benefits in planning for retirement will be wiped out and moneys which are being paid out under the Pension Plan on a monthly basis to a number of NMU employees, who rely on these payments to finance modest retirements, have stopped. (Joint Appendix pp. 62a-63a, 86a).

Moreover, it is reasonable to assume that plaintiffs, being active members of the NMU, have long known of the NMU Pension Plan amendments. Indeed, plaintiff Padilla, himself, has received lump sum payments under

the Plan (Joint Appendix p. 85a) and, as Judge Danaher noted in his dissent, the original Plan and each of its subsequent amendments and annual reports have been filed with the Department of Labor and have been matters of public record available to these plaintiffs. 423 F. 2d at 401, 405 (p. 32A, 39A *infra*) (Joint Appendix p. 85a-87a).

There are, therefore, material factual issues to be resolved on the issue of plaintiffs' laches concerning the time at which these plaintiffs became aware of the inclusion of non-officers under the Plan and, if they delayed after having acquired this knowledge, as to the reasonableness of their delay.*

The majority opinion in the Court of Appeals rejected defendants' defense of laches on the grounds that ". . . the matter of improper payments of union funds to persons not entitled to them is a continuing offense and cannot bar an injunction to prevent continued payments or an accounting for all of the unlawful expenditures". 423 F. 2d at 399 (p. 28A *infra*) But while the defense of laches may not bar an injunction to prevent continued payments, also involved here are moneys that have already been paid out to NMU employees, for which moneys the Court of Appeals has intimated that the defendants may be personally liable. 423 F. 2d at 399 (p. 27A *infra*)

Since there are material factual issues present here concerning the intent of the NMU membership and the drafters of the 1960 Constitution, as well as with respect to the plaintiffs' laches, this Court should grant certiorari to ensure that defendants have the factual determination to which they are entitled. As Judge Danaher stated in his dissent:

> "It seems to me that a hearing, at least on this aspect of the case [laches], was clearly in order. I

* As Judge Danaher noted in his dissent, this action was commenced during the course of an NMU election in which plaintiffs Morrissey and Padilla were soundly defeated. 423 F. 2d at 405 (Joint Appendix p. 64a; p. 39A *infra*)

fail to see how the Judge could have faulted the defendants as having 'made no showing that they have been prejudiced by the delay'. To what extent that conclusion of the District Judge entered into his determination that summary judgment was in order we do not know. *But we do know that despite the absence of extrinsic evidence both on this point and with respect to what was in fact the intention of the Union, summary judgment for the plaintiffs was directed. If summary judgment were not to be entered in favor of the defendants for the reasons previously advanced, at the very least according to my appraisal of the record here there should have been a hearing. There was error on account of that failure if for no other reason.*" 423 F.2d at 405 (p. 40A *infra*) (Emphasis added)

III.

Since defendant Segal was not a party to this action at the time plaintiffs made their motion for summary judgment and at the time of the hearing of said motion, and the District Court subsequently refused him the right to reargue, this Court should grant certiorari to remedy this clear departure from proper judicial procedure.

It is a fundamental tenet of due process that one cannot be bound by a judgment *in personam* resulting from litigation in which he was not designated a party or to which he has not been made a party by service of process. *Hansberry* v. *Lee* 311 U. S. 32, 40 (1940); *Pennoyer* v. *Neff* 95 U. S. 714 (1878). This rule was violated in this case since defendant Segal was not a party at the time of the hearing of plaintiffs' motion for summary judgment (March 26, 1969) and, therefore, to the extent that the judgment

of the District Court applied to him, it seems clearly void, yet the Court of Appeals ignored this fundamental defect.*

This defect was not cured by the fact that defendant Segal submitted an affidavit in support of the motion of defendants Curran, Wall and Perry to reargue inasmuch as the District Court refused to grant the motion to reargue as to defendant Segal, even though it was aware that he was not a party at the hearing of the motion for summary judgment. (p. 14A *infra*) (Joint Appendix pp. 58a-59a) In a very real sense the motion to reargue as to defendant Segal was a misnomer, since he was in effect asking the District Court for the right to present his case for the first time—a right which the court denied him.

IV.

The holding of the Court of Appeals that defendants Segal and Karchmer, trustees of the NMU pension plan, are subject to the fiduciary duties of 29 U.S.C. § 501 directly conflicts with the express provisions of the Labor-Management Reporting and Disclosure Act of 1959 and the intent of Congress, and such holding, if allowed to stand, will seriously hamper the proper administration of union pension plans throughout the United States.

A. The Intent of Congress

Defendants Segal and Karchmer were named as defendants in this proceeding because of their activities as trustees of the NMU Pension Plan. They became trustees of the Pension Plan pursuant to an agreement and declaration of trust entered into in December 1952 (Joint Ap-

* The Court of Appeals included this issue among "the remaining points raised by the defendants [which] do not merit discussion." (p. 29A *infra*)

pendix p. 60a). This trust agreement clearly sets forth their duties and obligations to the NMU and to the beneficiaries of the Plan.

29 U.S.C. § 501(a) imposes a fiduciary duty upon "officers, agents, shop stewards, and other representatives of a labor organization." These terms are defined in 29 U.S.C. § 402(q) as including:

> ". . . elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments, or major units or organizers who exercise substantial independent authority), but does not include salaried non supervisory professional staff, stenographic and service personnel."

Clearly, defendants Segal and Karchmer do not fall within these categories and are, therefore, not proper parties to this lawsuit. Their connection with the NMU was created and defined by the trust agreement. They have no other union duties or obligations and do not exercise any other independent authority with the NMU.

A further analysis of the statutory provisions as well as their legislative history clearly indicates that Congress did not intend to include trustees of union pension plans, such as defendants Segal and Karchmer, under the provisions of § 501.

First, § 501(a) fixes the fiduciary duties of union officials and does not specifically mention trusts or trustees, whereas § 502, which establishes a bonding obligation for certain named individuals, specifically refers to representatives "of a trust in which a labor organization is interested." Thus, the fact that trusts are specifically included in § 502 but not in § 501 indicates a Congressional intent to exclude trustees and trusts from the fiduciary duties established in § 501.

Moreover, when Congress intended to control trusts in other federal legislation, it did so in explicit terms. Thus, 29 U.S.C. §§ 301 ff., "The Welfare and Pensions Plans Disclosure Act" explicitly requires the publication, disclosure and reporting of union pension and welfare plans. Similarly, 29 U.S.C. § 186(e) explicitly grants District Courts jurisdiction in suits to restrain payments by employers to trust funds under certain circumstances. Seen against a background of explicit reference in other statutes, the absence of the mention of trusts in § 501 and the specific reference in § 502 gives even stronger support to the conclusion that trusts or trustees were not intended to be covered in § 501.*

The legislative history of § 501 also indicates clearly that Congress did not intend to include trusts or trustees under its mandate. Senate bill S. 1555 as passed by the Senate on April 25, 1959 contained a section which provided:

> "Every officer, agent, or other representative of a labor organization engaged in an industry affecting commerce, *or of a trust in which such organization is interested,* shall, with respect to any money or

* Recent amendments to the "Welfare and Pensions Plans Disclosure Act" proposed by President Nixon also indicate that Congress did not intend to reach trusts or trustees under § 501. These proposed amendments, see Senate *Congressional Record* (daily ed. March 13, 1970), 3656-3674, would provide a Federal standard of conduct—the "prudent man" rule—for all administrators of employee benefit funds including trustees such as defendants Segal and Karchmer. Thus, if the fiduciary duties of trustees of union pension plans—such as the one involved here—were intended to be established under § 501, it would have been totally unnecessary to propose these amendments to the Welfare and Pensions Plans Disclosure Act. Moreover, it is significant to note that the amendments to the Welfare and Pensions Plans Disclosure Act proposed by the Nixon administration were introduced on the Senate floor by Senator Jacob Javits who took an active part in the formulation of the Labor-Management Reporting and Disclosure Act of 1959. 1959 U. S. Code Cong. and Admin. News 2421.

> other property in its custody or possession by virtue of his position as such officer, agent or representative, have a relationship of trust to any such labor organization and the members thereof, *or to any such trust and the beneficiaries thereof*, and shall be responsible in a fiduciary capacity for such money or other property, notwithstanding any exculpatory clause or action purporting to exempt him from such responsibility." 1 Leg. His. LMRDA (NLRB) pp. 576-577* (Emphasis added).

The emphasized language was omitted from § 501(a) of House bill H. R. 8342 as subsequently reported, 1 Leg. His. LMRDA (NLRB) pp. 730-731, and the language of § 501(a) of H. R. 8342 was subsequently enacted as the present statute. Thus, explicit language including trusts and trustees under the fiduciary duty imposed under § 501 was proposed and then rejected in Congress, indicating a deliberate decision to exclude trustees from the fiduciary duties created in § 501.

Furthermore, the very purpose of the Act demonstrates that Congress did not intend to cover trustees of union pension plans. By enacting the fiduciary obligation of § 501 Congress hoped to clarify the fiduciary responsibilities of union officials to their members in view of the existing uncertainty about their legal responsibility. It was feared that absent such legislation, union members might have no remedy for official misconduct. See Senate Report No. 187, Minority Views, 1959 U. S. Code Cong. and Admin. News 2376-2377; House Report No. 741, Supplementary Views, 2479-2480.

As a result of the Trust Agreement, defendants Segal and Kaechmer were plainly fiduciaries under state law. There is no doubt that they had fiduciary responsibilities

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* Citation refers to a two volume exhaustive compilation and survey of the legislative history of the Labor-Management Reporting and Disclosure Act of 1959 prepared by the National Labor Relations Board.

and may be sued in a state proceeding for breach of such duties. Obviously, § 501 was not intended to cover them. They were not officials about whose responsibility some uncertainty existed; their fiduciary duties were clear.*

B. The Importance of the Issue

The question whether trustees of union pension plans are proper parties within § 501 has not been decided by this Court and is an important issue to the proper administration of union pension plans. Trustees, such as Messrs. Segal and Karchmer, who have no connection with unions except for their duties as trustees of pension plans, assume well-defined substantial fiduciary duties under their trust agreements and the applicable body of state law. As a result of the decision of the Court of Appeals, they are now also fiduciaries under a relatively new federal law and have the added burden of examining unfamiliar union constitutions, which are frequently poorly drafted, to determine whether there is constitutional authorization for the action of the union officers with whom they deal. This is clearly an unreasonable burden to impose on trustees who, at least before the decision of the Court of Appeals, had their duties and obligations defined only by trust

* The Court of Appeals rejected the claim of defendants Segal and Karchmer that they were not proper parties under 29 U.S.C. § 501 on the basis of *Tucker* v. *Shaw*, 378 F.2d 304, 308 (2d Cir. 1967). (p. 28A *infra*) But the Court in *Tucker* had specifically stated that it was not deciding whether trustees of a pension fund are proper parties, 378 F.2d at 307, and in a later decision in the same case, the District Court of the Eastern District of New York, recognizing that the issue was still open, granted a motion by the trustees to dismiss for lack of subject matter jurisdiction, holding after an exhaustive study of the Congressional reports and debates, that trustees of union pension plans were not intended to be covered under 29 U.S.C. § 501 and that the doctrine of pendent jurisdiction did not apply. See *Tucker* v. *Shaw* 308 F.Supp. 1 (E.D.N.Y. 1970).

agreements and state law. The holding of the Court of Appeals therefore can have a detrimental effect on the administration of union pension plans by discouraging responsible and highly reputable experts in the field of employee benefits, such as Martin E. Segal, and responsible accountants, such as Leon Karchmer, from even offering their services in the administration of union pension plans.

V.

This Court should exercise its power of supervision over the Court of Appeals since it clearly violated the requirements of Rule 35(b) of the Federal Rules of Appellate Procedure.

Rule 35(b) of the Federal Rules of Appellate Procedure clearly states:

> ". . . a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or *a judge who was a member of the panel that rendered a decision sought to be reheard* requests a vote on such a suggestion made by a party." (Emphasis added)

The rule makes it clear that *every* member of the panel that rendered a decision—no matter what his status—shall have a right to request a vote on a suggestion for a rehearing *en banc*. Clearly, if this Court had intended that only active judges on the forum Circuit could request a vote, it would not have added the language emphasized above. However, contrary to the plain meaning of the Rule, Judge John A. Danaher, Senior Circuit Judge of the District of Columbia Circuit, sitting by designation on the three-judge panel that rendered the decision, was not

afforded an opportunity to request a vote on defendants' suggestion (See Appendix I *infra*)*

Moreover, in light of Judge Danaher's strong dissent and his vote to grant the petition for a rehearing (See Appendix "H" *infra*), defendants have been seriously prejudiced by the court's action. Assuming a request for a vote by Judge Danaher, it is conceivable that a majority of the members of the Second Circuit would have voted for a rehearing *en banc*. At least it should not be left to speculation what action the Judges of the Second Circuit would have taken had the requirements of Rule 35(b) been followed. In the exercise of its supervision over lower federal courts, this Court should grant certiorari to insure proper compliance with this Rule.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WHITNEY NORTH SEYMOUR
Counsel for Petitioners
One Battery Park Plaza
New York, New York

ROY L. REARDON
JAMES S. MONTANA, JR.
Simpson Thacher and Bartlett,
Of Counsel,

June 29, 1970

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* The defendants made a motion for reconsideration of the denial of the petition for a rehearing *en banc* on this basis but the motion was denied without comment. (See Appendix "J" *infra*)

APPENDIX A

Text of Statutes

Federal Rules of Civil Procedure

Rule 56. Summary Judgment

* * * * *

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . ."

Federal Rules of Appellate Procedure

Rule 35. Determination of Causes by the Court in banc.

"(b) Suggestion of a Party for a Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a Party."

Labor-Management Reporting and Disclosure Act of 1959

29 U.S.C. §402(q)

"Officer, agent, shop steward, or other representative," when used with respect to a labor organization,

includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include salaried non-supervisory professional staff, stenographic, and service personnel."

29 U.S.C. §501(a)

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organizations and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and by-laws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and by-laws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

Appendix A

29 U.S.C. §501(b)

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward or representative in any district court of the United States or in any state court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made *ex parte*. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

APPENDIX B

Memorandum Decision.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

MEMORANDUM

BONSAL, *D. J.*

Plaintiffs are three members of the National Maritime Union of America (NMU); defendants Curran and Wall are elected officers of the NMU; defendant Perry was an employee of the NMU and Assistant to the President; and defendants Segal, Freedman, and Karchmer are trustees of the NMU Officers' Pension Plan (the Pension Plan).

Plaintiffs instituted this action in February 1969. The complaint alleges that defendants allowed the Pension Plan to be amended in 1961, so as to include as participants designated employees of the NMU, who were not elected officers of the NMU (non-officers), in violation of the NMU Constitution then in effect; and that the amendment was designed to siphon NMU funds to the non-officers who were not authorized to receive them. Plaintiffs seek an accounting and money damages from the defendants

responsible; an injunction enjoining the Trustees from paying any benefits to non-officers; and costs, disbursements, and attorneys' fees, under 29 U. S. C. § 501(b).

Defendants Curran, Wall, and Perry (moving defendants) move for an order, pursuant to Rule 12, F. R. Civ. P., dismissing the action; or, in the alternative, for an order, pursuant to Rule 56, F. R. Civ. P., for summary judgment on their behalf. Plaintiffs cross-move for summary judgment as against all defendants.

In 1951, following the amendment of the NMU Constitution, Article 15, entitled "Salaries of Officers," provided, in part, as follows:

> "*Section 1—Salaries and Expenses; The National Council* . . . is empowered, subject to approval of the membership, to set from time to time *the actual salaries* and daily expenses *of all Union officers and employees.*
>
> * * *
>
> *Sec. 8—Pension and Welfare:* The National Council, subject to approval of the membership is empowered to make adequate and appropriate provisions for *pensions*, welfare, and similar benefits *for officers and employees of the Union.*" (Emphasis added.)

On December 29, 1952, an Agreement and Declaration of Trust (the Trust Agreement) was entered into between the NMU and three Trustees, including defendants Segal and Karchmer, granting to the Trustees authority to establish the Pension Plan.

On February 16, 1953, the Trustes promulgated the Pension Plan, which provided that "officers" who had attained a certain age and had credit for a certain number

of years of "covered employment" were eligible to receive pension benefits."

In 1969, the NMU Constitution was again substantially revised and a new Article II, entitled "Compensation of Officers," was substituted for Article 15 of the 1951 Constitution.

Article II provided, in relevant part:

"*Section 1. Salaries:* (a) The National Council shall fix the *salaries for all officers of the Union*, subject to approval as provided by this Constitution.

. . . .

Sec. 2. Pensions: All officers shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of the Plan may establish." (Emphasis added.)

Article 8, entitled "National Office," was also amended in 1960 to provide that the National Office was "responsible for and shall fix the salaries" of staff personnel of the

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Relevant provisions of the Pension Plan were as follows:

"Article II — Definitions

Section 5. '*Officer*' shall mean a person holding any one of the following offices in accordance with the provisions of the NMU constitution:

National President
National Secretary
National Treasurer
Vice President
National Port Committee Member
Branch Agent
Field Patrolman
Patrolman

. . . .

Section 7. '*Covered Employment*' shall mean employment as an officer of the NMU."

Appendix B

NMU, including the non officers, and shall negotiate collective bargaining agreements for the employees of the NMU.

On October 28, 1961, the Trust Agreement of 1952 was amended so as to make eligible for pension benefits non-officers holding the following positions, and the Pension Plan was amended accordingly:

Assistant to the President
Organizer
Maintenance Supervisor
Bookkeeping Supervisor
Records and Supplies Supervisor
Executive Secretary
Publicity Director
Editor of "The Pilot."

Plaintiffs contend that the defendants violated the 1960 Constitution by allowing non officers to be included in the Pension Plan. On the other hand, the moving defendants assert that they were acting under their power in Article 5 to fix salaries and bargain collectively for NMU employees; and that this power included the right to provide pension benefits under the Pension Plan for non-officers.

Article 15 of the 1951 Constitution empowered the National Council "to make . . . provisions for pensions . . . for officers and employees of the Union." Article 14 of the 1960 Constitution deleted the word "employees," stating that "All officers shall be eligible for benefits under the [Pension Plan]." Thus, the 1960 Constitution did not continue the authority to include non-officers in the Pension Plan.**

While the term "salaries" may include "pensions," as delayed payments of salary, *Brumbaugh v. Baxter*, 225

**The authority to provide pensions for employees in the 1951 Constitution was not exercised by the NMU. The Pension Plan between 1951 and 1960 included officers only.

N. C. 691, 36 S. E. 2d 281 (1945), see *Inland Steel Co. v. N. L. R. B.*, 170 F. 2d 247 (7th Cir. 1948), *cert. denied*, 336 U. S. 960 (1949), the 1960 Constitution carefully distinguished between the two, using the term "compensation" in the title of Article 14 to encompass "salaries" in section 1 and "pensions" in section 7. In the previous Constitution, the word "salaries" was used in Article 15 to cover both. Moreover, a reading of Article 14 of the 1960 Constitution makes a clear distinction between officers and employees. Thus, section 5, with reference to illness, speaks of "an officer or employee," and section 6, relating to severance pay, again speaks of "an officer or employee," while section 7, dealing with pensions, speaks of "all officers."

Since the 1960 Constitution did not authorize the inclusion of the non-officers in the Pension Plan and it is not denied that funds of the NMU have been paid to the Trustees for disbursal to the non-officers under the Pension Plan, plaintiffs are entitled to relief under 29 U. S. C. § 501.

Plaintiffs argue that they are entitled to summary judgment since the only issue in the case, the construction of the 1960 Constitution, has been resolved in their favor. On the other hand, moving defendants say that there are contested issues as to which of the individual defendants were responsible for the amendment including non-officers in the Pension Plan; whether adoption of the amendment was a breach of fiduciary duty; and whether plaintiffs' action is barred by laches. In addition, defendant Karchmer asserts that he was not timely served by plaintiffs with their cross-motion for summary judgment and that he is not a proper party defendant under 29 U. S. C. § 501.

There is no genuine issue of fact as to the responsibility of the defendants. It is admitted that defendant Curran, as President of the NMU, and defendants Karchmer, Segal, and Freedman, as Trustees of the Pension

Fund, were responsible for authorizing the amendment including the non-officers in the Pension Plan. Defendant Wall, as Secretary-Treasurer, is responsible for the financial affairs of the NMU, and under the 1960 Constitution he and Curran are "directed to pay all obligations incurred by or on behalf of the Union," including payments to the Pension Plan. Defendant Perry, formerly Assistant to the President, was a non-officer who by the amendment was made eligible to receive pension benefits under the Pension Plan.

Under 29 U. S. C. § 501, defendants Curran, Wall, and Perry owe a fiduciary duty to the NMU and its members

> "to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution . . . and . . . to refrain . . . from holding or acquiring any pecuniary . . . interest which conflicts with the interests of such organization . . ."

Defendants Karchmer, Segal, and Freedman owe the same fiduciary duty to the NMU and its members as Trustees of the officers' Pension Plan.

Plaintiffs' action for breach of defendants' fiduciary duties is not barred by laches. The amendment, including the non-officers in the Pension Plan was adopted in 1961, and less than seven years later plaintiffs requested the NMU for an accounting and for a return of moneys contributed to the Pension Plan. In an action based on breach of fiduciary duties, the defense of laches is carefully scrutinized, *Libby v. L. J. Corporation*, 247 F. 2d 78, 82 (D. C. Cir. 1957), and in this case defendants have made no showing that they have been prejudiced by the delay.

Although it appears that plaintiffs did not timely serve their cross-motion for summary judgment, see Rule 56(c), F. R. Civ. P., the court will consider the cross-motion, inas-

much as it could enter judgment for plaintiffs on its own motion, *Bell v. Waterfront Commission of N. Y. Harbor*, 183 F. Supp. 156 (S. D. N. Y. 1960), *aff'd*, 279 F. 2d 853 (2d Cir. 1960). See also *Williams v. Howard Johnson's Inc. of Washington*, 323 F. 2d 102, 104 (D. C. Cir. 1963); 6 Moore, *Federal Practice*, ¶ 56.15[6] (2d ed. 1966).

Accordingly, defendant's motion to dismiss plaintiffs' action or, in the alternative, for summary judgment, is denied. Plaintiffs' motion for summary judgment is granted, and judgment will be entered in favor of plaintiffs, directing defendants to account; enjoining defendant Trustees from paying any benefits under the Pension Plan to non officers; and directing the Trustees to return to the NMU all moneys received by the Trustees for the benefit of non-officers, with interest from the dates the moneys were received. Plaintiffs are entitled to costs, disbursements and attorneys' fees out of the amounts returned by the Trustees to the NMU, in such amounts as may be approved by the court.

Settle order on notice.

Dated: New York, N. Y.,
May 23, 1969.

DUDLEY B. BONSAL,
U. S. D. J.

APPENDIX C

Order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon reading the complaint and the annexed exhibits thereto, the answers of defendants Abraham E. Freedman and Leon Karchmer, the Notice of Motion of defendants Joseph Curran, Shannon Wall and William Perry, ("moving defendants") dated February 27, 1969, for an order, pursuant to Rule 12 of the Federal Rules of Civil Procedure, dismissing the complaint, or, in the alternative, for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment on their behalf, the affidavit of defendant Shannon Wall sworn to on February 27, 1969 and the exhibits attached thereto in support thereof, the Notice of Cross-Motion dated March 19, 1969 for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of plaintiffs, the affidavit of Arthur E. McInerney, Esq. sworn to March 18, 1969 in opposition to defendants' motion and in support of plaintiffs' cross-motion, the affidavit of Charles Sovel, Esq., sworn to March 24, 1969, submitted on behalf of moving defendants and in opposition to plaintiffs' cross-motion, the affidavit of Roy L. Reardon, Esq., sworn to March 24, 1969 and the exhibit attached thereto submitted on behalf of defendant Leon Karchmer and in connection with the motion of defendants Joseph Curran, Shannon Wall and William Perry, and in opposi-

tion to plaintiffs' cross-motion, and the Court having heard oral argument on March 26, 1969 by Charles Sovel, Esq., of counsel to Abraham E. Freedman, Esq., on behalf of moving defendants in support of their motion to dismiss the complaint, or, in the alternative, for summary judgment against the plaintiffs and in opposition to plaintiffs' cross-motion for summary judgment, and by Arthur E. McInerney, Esq., of counsel to Messrs. Duer & Taylor, on behalf of plaintiffs in support of plaintiffs' cross-motion for summary judgment in favor of plaintiffs and in opposition to defendants' motion, and defendants Joseph Curran, Shannon Wall, William Perry, Abraham E. Freedman and Leon Karchmer having been served with process and having appeared by counsel prior to the hearing on said motion and cross-motion on March 26, 1969, and the Court having rendered a decision in writing dated May 23, 1969, and also filed on that day, and the defendant Martin Segal having been served herein, and having filed an affidavit in support of defendants' motion for reargument.

Now, on motion of Simpson Thatcher & Bartlett, attorneys for defendant Leon Karchmer, it is

ORDERED, that defendants' motion to dismiss the complaint, or, in the alternative, for summary judgment, be denied, and it is further

ORDERED, that plaintiff's motion for summary judgment is granted and that the Clerk of the Court enter judgment granting plaintiffs' cross-motion for summary judgment; directing defendants to account; enjoining defendant Trustees from paying any benefits under the Pension Plan to non-officers; and directing the Trustees to return to the NMU all moneys received by the Trustees for the benefit of non-officers, with interest from the dates the moneys were received; and it is further

Appendix C

ORDERED, that plaintiffs be granted costs, disbursements and attorneys' fees out of the amounts returned by the Trustees to the NMU, in such amounts as may be approved by the Court.

Dated: New York, New York
July 11, 1969

DUDLEY B. BONSAL
United States District Judge

Judgment entered 7/18/69

JOHN LIVINGSTON
Clerk

APPENDIX D

Decision and Order on Motion for Reargument.

Defendants' motion for reargument is denied. The interpretation of the meaning of "salaries" sought by defendants would not change the holding that only officers were eligible for benefits under the NMU Officers' Pension Plan, for the reasons stated in the Memorandum filed May 23, 1969. Therefore the inclusion of non-officers in the Plan was not authorized by the NMU Constitution as revised in 1960. Since such inclusion was beyond the power of the defendants, plaintiffs are entitled to appropriate relief.

Consideration has been given to the affidavit of the defendant Martin Segal dated June 11, 1969, which was filed in support of the defendants' motion for reargument. Mr. Segal is one of the trustees of the NMU Officers' Pension Plan, who appeared in the action and filed his answer on May 1, 1969. The court does not question Mr. Segal's good faith as trustee. However, the plaintiffs are entitled to obtain the return to NMU of the monies paid to the Fund on behalf of non-officers since their inclusion was not authorized.

It is so-ordered.

Dated: New York, N. Y.
July 3, 1969.

DUDLEY B. BONSAL
U. S. D. J.

APPENDIX E

Decision and Order on Motion for an Injunction.

The amendments to the NMU Constitution are not exculpatory provisions prohibited by 29 U. S. C. 501. Their purpose is obviously to include non officer employees in the NMU Officers' Pension Plan. According to the Certification of the Honest Ballot Association, dated June 24, 1969, the following amendments were adopted by a vote of 10,013 to 1,685:

"Add the following paragraph to Article 8, Section 11:

(d) The National Office shall have the authority to provide pensions for all past and present employees of the Union and to protect the pension rights of all past and present employees of the Union.

"Amend Article 14, Section 7 to read as follows:

'Pensions: All officers and such employees as the National Office may designate shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan.'"

While it is stated that 12,040 members obtained a ballot, it is not stated how many members of NMU were eligible to vote. The amendment to Article 14, Section 7 provides that "the National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan." However, it does not appear that the National Office has exercised this authority.

Appendix E

Plaintiffs' motion is denied, without prejudice to the plaintiffs seeking further relief by appropriate application if the defendants should violate the order of the court.

It is so ordered.

Dated: New York, N. Y.
July 3, 1969.

DUDLEY B. BONSAL
U. S. D. J.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 309-312—September Term, 1969.

(Argued November 19, 1969 Decided February 20, 1970.)
Docket Nos. 33884, 33918, 33919 and 33937

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Plaintiffs-Appellees-Appellants,

—v.—

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN and LEON KARCHMER,

Defendants-Appellants-Appellees.

Before:

LUMBARD, *Chief Judge*,
DANAHER* and ANDERSON, *Circuit Judges*.

Appeals from a denial of defendants' motion for summary judgment and a granting of plaintiffs' cross-motion for summary judgment, but denial of plaintiffs' petition for an injunction, by the United States District Court, Southern District of New York, Dudley B. Bonsal, *Judge*, holding that pension payments made to certain employees of National Maritime Union of America were, under the

* John A. Danaher, Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

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Union's constitution, improperly made. Affirmed in part and reversed and remanded in part.

CHARLES SOVEL, Esq., New York, N. Y. (Abraham E. Freedman, Esq., New York, N. Y., on the brief for Defendants Joseph Curran, Shannon Wall and William Perry), *for Defendants-Appellants Curran, Wall, Perry and Abraham E. Freedman.*

ROY L. REARDON, Esq., Simpson, Thacher & Bartlett, New York, N. Y., *for Defendants-Appellants Martin E. Segal and Leon Karchmer.*

ARTHUR E. MCINERNEY, Esq., New York, N. Y. (Duer & Taylor, New York, N. Y., on the brief), *for Plaintiff-Appellees.*

ANDERSON, *Circuit Judge:*

This case arises under § 501 of the Labor Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 501 (1964), and concerns the propriety of certain payments made into the Officers' Pension Fund of the National Maritime Union (NMU). The plaintiffs, James M. Morrissey, Joseph Padilla, and Ralph Ibrahim, have been members in good standing of the NMU since approximately 1950. The defendant Joseph Curran is the national president and the defendant Shannon Wall is the national secretary-treasurer of the NMU, both elective positions. The defendant William Perry is the recently retired assistant to the president of the Union, a non-elective position. The defendants Abraham E. Freedman, Martin E. Segal, and Leon Karchmer are the trustees of the NMU Officers' Pension Plan.

The structure of the NMU and the powers and duties of its officers and various internal governing bodies are set

out in the Union's constitution. It makes provision for three governing units which have nation-wide jurisdiction. The ultimate authority is vested in the National Convention, which meets triennially and is composed of the elected delegates from various ships and ports. When the National Convention is not in session, the Union is governed by the National Council, which holds regular annual meetings and consists of the elected national officials and certain other delegated representatives. When the National Council is not in session, governing authority rests in the National Office, made up of the national president, secretary-treasurer, three vice presidents, and three national representatives. This body is primarily responsible for the day to day, internal administration of NMU affairs.

In 1951 the NMU constitution was amended to permit the National Council, subject to membership approval, to provide pension benefits for all NMU officers and employees.[1] On December 29, 1952, pursuant to this authority, the National Council entered into an Agreement and

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1. The pertinent provisions of the 1951 NMU constitution read as follows:

"ARTICLE 15 SALARIES OF OFFICERS

SECTION 1—SALARIES AND EXPENSES: The National Council, considering the financial state of the Union, is empowered, subject to approval of the membership, to set from time to time the actual salaries and daily expenses of all Union officers and employees.

The National Council shall pay all salaries, approved by the membership, of all Union officers and employees. . . .

* * *

SEC. 8—PENSION AND WELFARE: The National Council, subject to approval of the membership is empowered to make adequate and appropriate provisions for pensions, welfare, and similar benefits for officers and employees of the Union."

Between the 1951 amendment to the constitution and 1960 pension plans were adopted for the employees pursuant to collective bargaining agreements.

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Declaration of Trust with three trustees which gave them the authority to establish a pension plan. On February 16, 1953, the trustees adopted a plan whereby pension rights accrued to the various elected officials of the Union, including the president, secretary, treasurer, vice-president, national port committee member, branch agent, field patrolman, and patrolman. No non-elected employee of the Union was included under its coverage. The majority of the administrative employees of the NMU were represented by this or other unions in their employment relationship with the NMU and had been granted pension rights, as permitted by the 1961 NMU constitution, as a part of their respective collective bargaining agreements.[1a]

On October 28, 1961, the National Office (as opposed to the National Council) authorized an amendment to the Agreement and Declaration of Trust, the effect of which was to extend its coverage to certain executive and supervisory employees of the Union who held appointive rather than elective positions, such as the assistant to the president, organizer, executive secretary, publicity director,

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1a. The last sentence of Article 8(a) of the 1960 constitution which concerns technical, clerical and administrative personnel attached to or under the National Office, provides:

> "Whenever possible, such employees shall be members of the NMU or of appropriate AFL-CIO affiliates."

With nothing shown to the contrary, it may be assumed that all of the few non-elected employees, arbitrarily brought under the Officers' Pension Plan by the National Office, already had pension coverage under collective bargaining agreements applicable to them. It must be emphasized that the present case nothing whatever to do with such pension coverage, nor do the plaintiff in any way challenge or seeks to disturb those pension rights of the administrative employees. Rather, in the present action, they are questioning only the awards to the special few non-elected employees who have been granted the lucrative "pension rights" under the Officers' Pension Plan. For example, one of these special employees, the defendant Perry, who incidentally already had coverage under the NMU Deep Sea Pension Plan, resigned as assistant to the president, January 16, 1969, and, as a specially created beneficiary received over $100,000 under the Officers' Pension and Plan alone.

editor of the Pilot (the union house organ); and supervisors over maintenance, bookkeeping, records and supplies.[2]

Prior to the adoption of the amended Declaration of Trust, however, the NMU constitution had been subjected to an extensive revision whereby, along with other changes, the authority vested in the National Council to fix the salaries of certain employees was shifted to the National Office and the requirement for membership approval thereof was deleted.[3] This revision became effective on December 2, 1960.

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2. Three years later, in 1964, the Officers' Pension Plan was again extended to include additional administrative personnel not covered by collective bargaining agreements.

3. The amendment applicable to this case read, in pertinent part, as follows:

"ARTICLE 8 NATIONAL OFFICE

* * *

SEC. 11—EMPLOYEES OF THE UNION: (a) The National Office shall be responsible for and shall fix the salaries of all technical, clerical, and administrative personnel as may be required for the effective administration of the Union's affairs. Wherever possible, such employees shall be members of the NMU or of appropriate AFL-CIO affiliates.

(b) Collective bargaining agreements affecting employees of the NMU shall be negotiated by the National Office or such officer or officers as it may designate; provided that no such agreements shall be made without specific approval by the National Office."

"ARTICLE 14 COMPENSATION OF OFFICERS

Section 1—Salaries: (a) The National Council shall fix the salaries for all officers of the Union, subject to approval as provided by this Constitution.

* * *

Sec. 7—Pensions: All officers shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish.

Sec. 8—Welfare: All officers shall be eligible for benefits under the Officers' Welfare Plan. The National Council, subject to membership approval, is empowered to improve the benefits under said Plan."

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The plaintiffs contend that the 1961 amendments to the Declaration of Trust, by the National Office, permitting benefits to be paid to non-elected employees under the Officers' Pension Plan were not authorized by and were in contravention of the NMU constitution, as amended in 1960. After Union officials refused to take any action, as requested, to obtain the return or funds paid into the Trust fund for the benefit of non-elected employees under the revised Plan, the plaintiffs filed a complaint in the district court seeking an accounting, a money judgment for any damages suffered by the Union or the Trust fund, and an injunction against further payments to non-elected employees.

On February 4, 1969, the district court (Bryan, *Judge*) granted leave, pursuant to 29 U. S. C. § 501(b), to commence this action. Defendants Curran, Wall and Perry moved to dismiss the complaint under Rule 12(b)(5), F. R. Civ. P., or in the alternative for summary judgment under Rule 56. The plaintiffs filed a cross-motion for summary judgment against all defendants. Oral argument was heard on both motions on March 26 (Bonsal, *Judge*), and on May 23 the defendants' motions were denied and plaintiffs' cross-motion was granted. 302 F. Supp. 32 (S. D. N. Y. 1969). The court held that the defendants should account for and repay pension funds accrued and paid to non-elected Union employees, that the defendant trustees should be enjoined from paying out of the Officers' Pension Plan fund further benefits to non-officers and the plaintiffs should recover costs and attorneys' fees.

Immediately following the district court decision, the National Council of the Union convened and proposed amendments to the constitution which gave the National Office of the NMU the authority, which the trial court had found it did not have under the 1960 amended constitution, to designate certain non-elected employees to be eligible

for benefits under the Officers' Pension Plan as well as the authority "to validate retroactively all pensions heretofore paid under the plan." The approval of these amendments was voted on June 24, 1969. The plaintiffs promptly moved to have the June 24th amendments declared invalid as exculpatory, and therefore void, under § 501(a)[4] and to enjoin any implementation of them. The relief sought was denied without prejudice on July 3, 1969. The defendants moved that the entire action be dismissed as moot on the ground that the new amendments removed any question of the power of the defendants to act as they did.

Meanwhile, on June 2, 1969, defendants Curran, Wall and Perry filed a motion for reargument of the May 23 decision. On June 6 the plaintiffs filed a motion to enjoin the defendants from being represented by counsel retained by the Union, to require defendants to pay their own counsel from funds not belonging to the Union, and to enjoin the implementation of the proposed amendments to the NMU constitution on the ground that they were exculpatory and therefore void under 29 U. S. C. § 501(a). On June 11 a motion for reargument was filed on behalf of defendants Segal and Karchmer. In separate orders entered on July 3, 1969, these motions were denied, except for the motion relating to representation of defendants by Union counsel, which was not ruled upon.

The defendants have appealed from the district court decision granting summary judgment to the plaintiffs, denying their own similar motion and their motions for reargument. The plaintiffs have filed an interlocutory ap-

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4. The pertinent language of the statute provides:

". . . A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

peal from the trial court's denial of their motion to declare invalid and enjoin the use of the June 24 amendments to the NMU constitution. The major dispute on these appeals concerns the proper interpretation of the provisions for establishing employee pension funds under the 1951 NMU constitution, as amended in 1960.

Defendants argue that the 1960 amendments were designed to shift the responsibility for the establishment of employee salaries from the National Council to the National Office and did not limit in any way the power of the National Office to establish employee pension funds. They assert that the terms "salaries," as used in Article 8, § 11, must be construed to include pensions, from which they claim it follows that the National Office was acting within its authority when it amended the Officer's Pension Plan in 1961. In support of this position they rely upon such cases as *Brumley v. Baxter*, 225 N. C. 691, 36 S. E. 2d 281 (1945), and *Giannettino v. McGoldrick*, 293 N. Y. 208, 66 N. E. 2d 57 (1946), which hold that pensions are compensation for past services as opposed to gratuities, and in that sense, are included within the term "salary." But as the district court pointed out in its opinion, the framers of the NMU constitution, when drafting the 1960 revision, clearly had in mind a distinction between salaries and pensions, as evidenced by the use of the term "compensation" in Article 14 to include both types of remuneration. The NMU constitution, as amended in 1960, was clear and explicit with regard to the persons covered by the pension provisions, and in the light of the history, context and wording of those provisions, the district court's rejection of the defendant's claim is correct. There was no genuine issue of material fact concerning the charge of a breach of duty on the part of the defendants, and summary judgment in favor of the plaintiffs should be affirmed.

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In support of their claim that the 1969 amendments[5] to the NMU constitution, made immediately following the district court decision, are exculpatory and that their application should be enjoined, the plaintiffs rely on *Highway Truck Drivers and Helpers Local 107 v. Cohen*, 182 F. Supp. 608 (E. D. Pa.), *aff'd*, 284 F. 2d 162 (3 Cir. 1960), *cert. denied*, 365 U. S. 833 (1961), and *Highway Truck Drivers and Helpers Local 107 v. Cohen*, 215 F. Supp. 938 (E.D. Pa. 1963), *aff'd*, 334 F. 2d 378 (3 Cir.), *cert. denied*, 379 U. S. 921 (1964). In the first of these two cases the district court found that it was improper for the local union to pay the attorney fees of union officers who were under criminal indictment. These fees were to be paid pursuant to a resolution of the local which permitted such payment, and that resolution was declared invalid because it authorized "action beyond the powers of the union as derived from its constitution and was inconsistent with the aims and purposes of the Labor-Management Reporting and Disclosure Act." 284 F. 2d at 164. The international union then amended its constitution to permit such authorizations. Thereafter in the second *Cohen* case the union officers claimed that the payments were valid as the amendment purported to be retroactive. In rejecting this claim the Third Circuit said:

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5. The following is the full text of those amendments:

"Amend Article 8, Section 11 to add the following paragraph:
The National Office shall have the authority to provide pensions for all past and present employees of the Union and to protect the pension rights of all past and present employees of the Union.

Ameind Article 14, Section 7, as follows:

Sec. 7—Pensions: All officers and such employees as the National Office may designate, shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan."

"That abortive attempt to validate the illegal 1959 resolution, could not of course in 1961 legitimatize the 1959 payments which have been held to have been wrongful. And the action of the International was just as inconsistent with Section 501 of the Labor Management Act as was the Local's ill conceived resolution." 334 F. 2d at 381.

The defendants in the present case, however, assert that the cases cited actually support the defense. It is their contention that the trial court held in the 1960 *Cohen* case that a resolution authorizing an expenditure of union funds was not an exculpatory provision in violation of § 501(a) and, in the 1963 *Cohen* case, that a constitutional amendment authorizing expenditures already incurred was not exculpatory unless the expenditures themselves were in violation of § 501 of the Act. Turning to the present case they argue that the court below did not find that the payments into the Officers' Pension Plan for the benefit of employees were per se violative of § 501(a), and therefore any subsequent constitutional provision purporting to validate the past payments cannot be exculpatory within the meaning of § 501(a). In making this assertion, the defendants conveniently overlook the fact that the trial court did find that they had breached their duties because the expenditures in question were not authorized by the NMU constitution and that they were in violation of § 501 of the Act. In the *Cohen* cases the trial court was affirmed because the local union authorized actions beyond its powers as derived from the constitution and because its effort to pay attorneys' fees for officers who had been derelict in their duties was "inconsistent with the aims and purposes of the Labor Management Reporting and Disclosure Act." We agree with the position taken by the Third Circuit. Otherwise the provisions of § 501 would be completely emasculated if, every time a court, at the behest

of complaining members of a union, found that the officers had breached their duties, the officers could find sanctuary by putting through a constitutional amendment or by-law retroactively to legitimatize their former dereliction of duty.

The defendants also argue that the district court "has not imposed any personal liability upon the defendants from which they needed to be 'exculpated,'" but we do not agree with this argument. The district court ordered the defendants to account for all moneys paid into the Officers' Pension Plan and return to the NMU all moneys received by the trustees for the benefit of non-officers with interest. It follows that if they are unable to recoup that money, they may be held personally liable.

The trial court's decison, however, on the plaintiffs' motion for an injunction, that the purpose of the 1969 amendments to the NMU constitution was to include non-officer employees in the NMU officers' pension plan and that the amendments were, therefore, not exculpatory provisions prohibited by § 501, is at odds with its holding that there was an obvious breach of duty on the part of the defendants in causing union funds to be paid out to persons who were not entitled to them. His conclusions might have been correct if the provisions were prospective only in their application but the amendment to Article 14, § 7 provides in part: "the National Office shall have the authority to validate retroactively all pensions heretofore paid under the plan." This is clearly exculpatory in intent and language. The NMU exercised its authority under the 1969 amendments to attempt to validate retroactively all the pensions previously paid. The determination that the 1969 amendments were not exculpatory is reversed and will be reconsidered on remand.

The defendants raise a number of additional minor issues, several of which will be commented upon. They

have throughout pressed the defense of laches. But the matter of improper payments of union funds to persons not entitled to them is a continuing offense and cannot bar an injunction to prevent continued payments or an accounting for all of the unlawful expenditures.

The defendants Segal and Karchmer claim that the ultimate order issued by Judge Bonsal exceeded the court's jurisdiction because it is their contention that the court's jurisdiction is fixed by the order issued by Judge Bryan on plaintiffs' application for leave to bring suit on February 4, 1969. This is an incorrect interpretation of § 501(b). The purpose of requiring permission to bring an action is a safeguard to protect the union officers from vexatious suits and once given is not to be treated as a stricture on jurisdiction. *Horner v. Ferron*, 362 F. 2d 224, 228 (9 Cir.), *cert. den.* 385 U. S. 958 (1966). An issue was also raised that Judge Bonsal had no power to grant summary judgment on plaintiffs' motion because of inadequacy of notice to some of the defendants. The trial court, however, had power, on its own motion to enter summary judgment against the party who was the original mover. 6 Moore: Federal Practice, ¶ 56.12 at 2241 (2d ed. 1966). While some of the defendants had only a brief opportunity to prepare for the argument on the plaintiffs' motion, there is nothing whatever to indicate that any party was at all prejudiced. *Stein v. Oshinsky*, 348 F. 2d 999, 1000-01 (2 Cir.), *cert. den.* 382 U. S. 957 (1965).

Defendants also argue that the trustees of the Officers' Pension Plan do not come within the definition of those having a fiduciary responsibility as set forth in 29 U. S. C. § 402(q). This court has specifically rejected this claim in *Tucker v. Shaw*, 378 F. 2d 304, 308 (2 Cir. 1967). The trial court was correct in finding that all of the defendants were in a position of trust and responsibility in relation to the monies charged to have been unlawfully expended and all

had a duty to see that it was restored to the Union treasury.

The remaining points raised by the defendants do not merit discussion.

We affirm denial of the defendants' motion for summary judgment and the entry of summary judgment in favor of the plaintiffs. As the June 24, 1969, amendments to the NMU constitution are clearly exculpatory as prohibited by 501(a), we reverse the denial of plaintiffs' motion to have these amendments declared void, and remand to the district court for appropriate action declaring the amendments to be without effect and enjoining defendants from acting in reliance upon them. As the district court apparently did not pass on so much of plaintiffs' motion as requested that defendants be enjoined from retaining counsel paid or to be paid with Union funds, this question should also be determined on remand. The controlling cases on this point are *Tucker v. Shaw*, *supra*, and *Holderman v. Sheldon*, 311 F. 2d 2 (2 Cir. 1962), in which we held that all that is necessary for enjoining of the defendants in a 501 action is that the plaintiff make "a reasonable showing that he is likely to succeed." We also note that the district court maintains continuing jurisdiction to insure that the accounting and return of funds to the Union treasury proceed as ordered, and, of course, it retains the power to issue the necessary orders to assure full compliance.

Affirmed in part, reversed in part, and remanded for further proceedings in compliance with this opinion.

DANAHER, *Senior Circuit Judge* (dissenting):

Although according great respect for the views of my colleagues and for those of the able District Judge, Honor-

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able Dudley B. Bonsal, I nonetheless fear that error has occurred.

The National Maritime Union of America (hereinafter, NMU) was founded in 1937. Some fourteen years later, the still young Union adopted a Constitution which, so far as is here pertinent, provided that "considering the financial state of the Union," the Union's National Council[1] was empowered to make adequate and appropriate provisions for pensions, welfare and similar benefits for officers and employees of the Union. That power was never rescinded, I suggest, but was later transferred to the National Office.

Agreeably to such authorization, effective as of February, 1953, the NMU Officers' Pension Plan was adopted, then covering all elected officers of NMU. There has been no challenge here to the validity of that Plan.

NMU in the management of its properties, in the administration of its far-flung business and in furtherance of its purposes,[2] utilized the services of a staff of lawyers, economists, pension administrators, staff experts in Washington, doctors, and supervisory staffs of Union owned real estate. For their protection as well as to further its own interest in their retention in its service, NMU negotiated with various unions of which its employees were members for the establishment of pension and welfare plans. As an employer, NMU was bound to bargain respecting hours, wages and conditions of employment. Although clearly authorized to do so, NMU had not until the events here

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1. The National Council was authorized to act between National Conventions. Another entity, known as the National Office, was accorded the same powers as those reposed in the National Council, to be exercised in the more frequent meetings of the National Office.

2. Some inkling of the nation-wide scope of the operations of NMU may be gleaned from the carefully-detailed findings of District Judge Motley outlined in *Wirtz v. National Maritime Union of America*, 284 F. Supp. 47 (S. D. N. Y. 1968); *affirmed* by this Court 399 F. 2d 544 (1968).

at issue, set up a separate plan for a few of its supervisory personnel, not elected officers and not represented by some union.

Some sixteen years after the original Plan had become effective, the plaintiffs here alleged that without authorization a lump sum benefit[3] had been accorded to the defendant Perry following his resignation as Executive Assistant to the National President. Purporting to base the action upon 29 U.S.C. § 501, the plaintiffs had sought an accounting, a money judgment against the defendants, and an injunction to restrain the Trustees from paying benefits to Perry or any other non-elected employees of NMU. The Union was not made a party. Under date of May 23, 1969, the District Judge filed an Opinion holding, compendiously, that there was no authority[4] for covering non-employees into the Plan, and so he granted summary judgment for the plaintiffs. He ordered the defendants to account, enjoined the Trustees from paying benefits under the Plan to non-officers, and further directed the Trustees to return to NMU, with interest, all moneys received by the Trustees for the benefit of non-officers.

I.

Meanwhile, Congress adopted the "Welfare and Pension Plans Disclosure Act," effective as of January 1, 1959[5] which defined an "employee pension benefit plan" to mean

3. The original Plan had specifically provided that the Trustees in their discretion might make a lump-sum payment in lieu of benefits otherwise provided. Indeed, the authorization was amended and extended in 1958.

4. There was no evidence that the officer defendants or the Trustees personally benefited in any way or otherwise acted unlawfully, or that they had exercised bad faith. Cf. *Bakery and Confectionery Workers Internat'l U. v. Ratner*, 335 F. 2d 691 (1964).

5. 29 U. S. C. A. § 301 et seq., PL 85-836, as amended by PL 87-420, 76 Stat. 35, which vastly increased the authority of the Secretary of Labor to supervise and to administer the disclosure requirements of the earlier Act.

"any plan, fund or program which is communicated or its benefits described in writing to the employees, and which was heretofore or is hereafter established by an employer or by an employee organization, or by both, for the purpose or providing for its participants . . . retirement benefits . . . ."

And the Act further defined the term "participant" to mean

"any employee or former employee of an employer or any member of an employee organization who is or may become eligible to receive a benefit of any type from an employee welfare or pension benefit plan. . . . ."

NMU became bound to submit annually to the Secretary of Labor a report describing the Plan, an annual financial statement, and further information in such form and detail as the Secretary might prescribe. NMU complied with those requirements.[6]

So it was in part, and with the Labor Management Reporting and Disclosure Act of 1959 (LMRDA)[7] by this time on the statute books, the 1951 Constitution was revised at an NMU Convention held in October, 1960, with ratification by the membership after a referendum vote concluded in December of 1960.

I deem it unthinkable that the NMU membership supposed for a moment that the amended Constitution was intended to wipe out whatever rights to coverage had been acquired since 1952. There was no repealer clause in the 1960 revision. To me, it is inconceivable that the eligibility established in 1952, followed by good faith reliance under

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6. 29 U. S. C. A. §§ 304-307. NMU furthermore was bound to report in detail to the Bureau of Internal Revenue and annually did so.

7. 29 U. S. C. A. § 401 et seq.

the express terms of the earlier Constitution [illegible] deemed obliterated. I reject the suggestion that the Constitution, as revised, had narrowed the authority of the Union to provide pensions for any of its [illegible] whether they be elected officers or employees, [illegible] their status.

On the contrary the 1960 Constitution even broadened benefits to be accorded to members whose rights had previously accrued, as for example where Article 15, Section 8(f), specified that members

> "receiving a monthly pension under the NMU Welfare and Pension Plan or the NMU Officers' Pension Plan shall not be required to pay dues and shall be regarded as honorary members . . ."

Against such background, lacking representation by any employee union and not possessing the status of elected officers, a few non-elected employees were brought into the Plan. Perry as Assistant to the President was included, certain others being identified as Organizer, Maintenance Supervisor, Bookkeeper Supervisor, Records and Shipping Supervisors, Executive Secretary, Publicity Director and the Editor of the NMU official News Organ. The [illegible]

In sum, my reading of the record [illegible] of the NMU Constitution convinces me [illegible] always been the plain intendment of this Union that pensions for both officers and employees be [illegible] next, that the power to establish any plans had been granted in 1951, with continuing authorization to amend [illegible]

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8. The Constitution in Article 13, Section 1, [illegible] National President that:

> (f) He may, in his discretion, and at such salary as the National Office may determine, appoint a member, or members, of the Union to assist him in the exercise of his administrative functions; provided that such assistant or assistants shall at the time act in an executive capacity.

plan might thereupon be established. See, for example, Article 15, Section 8 of the Constitution, ratified in 1951, which reads:

> The National Council, subject to approval of the membership, is empowered to make adequate and appropriate provisions for pensions, welfare, and similar benefits for officers and employees of the Union.

Nothing to be discerned from the revised Constitution, ratified December 2, 1960, detracted one whit from that authority. Rather, I suggest, the later revision must be read with the former. The only difference in giving effect to the continuing intent of the Union membership was that after the 1960 revision, the authority to act was transferred from the National Council to the National Office. I conclude that even without more than my analysis suggests, the District Judge erred in concluding that at the time the challenged action was taken, there had been a lack of authority to provide pensions for all past and present employees of the Union.

II.

But there was more. After the release of Judge Bonsal's May 23, 1969 Opinion, the Union promptly took steps to reiterate the NMU intention. If the judge could be heard to say the NMU had failed to make clear its intention, two amendments to the Constitution were immediately proposed. The amendments by referendum were forthwith approved by the membership by an overwhelming vote. Accordingly, the revised 1960 Constitution was further amended by the addition to Article 8, Section 11, of the following:

> (d)—The National Office shall have the authority to provide pensions for all past and present employees

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of the Union and to protect the pension rights of all past and present employees of the Union.

The membership further amended Article 14, Section 7, to read as follows:

> Pensions: All officers and such employees as the National Office may designate shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan.

These plaintiffs then attacked the amendments as "exculpatory" within the meaning of 29 U. S. C. § 501, and they sought an injunction. The District Judge flatly—and correctly—rejected that contention and ruled that the amendments "were not exculpatory provisions prohibited by 29 U. S. C. § 501. *Their purpose is obviously to include non-officer employees in the NMU Officers' Plan.*" (Emphasis added.)

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9. Decision and Order on Motion for an Injunction

The amendments to the NMU Constitution are not exculpatory provisions prohibited by 29 U. S. C. 501. Their purpose is obviously to include non-officer employees in the NMU Officers' Pension Plan. According to the Certification of the Honest Ballot Association, dated June 24, 1960, the following amendments were adopted by a vote of 10,063 to 1,085:

"Add the following paragraph to Article 8, Section 11:

(d)—The National Office shall have the authority to provide pensions for all past and present employees of the Union and to protect the pension rights of all past and present employees of the Union.

"Amend Article 14, Section 7 to read as follows:

Pensions: All officers and such employees as the National Office may designate shall be eligible for benefits under the NMU Officers' Pension Plan, subject to such rules and regulations as the Trustees of that Plan may establish. The National

Assuming that the Constitution had validly been amended, the District Judge's July 3, 1969 Memorandum observed, "It does not appear that the National Office has exercised this authority."

I read him to be saying: "I do not perceive that the necessary authority existed to include non-officers at the time they were covered into the Plan. But now NMU has conferred that authority. Even so as of this moment, the National Office has not so far exercised its power." And accordingly he concluded *only* that since the inclusion of non-officers "was beyond the power of the defendants, plaintiffs are entitled to appropriate relief."[10]

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[9] (cont'd)

Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan."

While it is stated that 12,040 members obtained a ballot, it is not stated how many members of NMU were eligibile to vote. The amendment to Article 14, Section 7 provides that "the National Office shall have the authority to validate retroactively all pensions heretofore paid under the Plan." However, it does not appear that the National Office has exercised this authority.

Plaintiffs' motion is denied, without prejudice to the plaintiffs seeking further relief by appropriate application if the defendants should violate the order of the court.

It is so ordered.

Dated: New York, N. Y.
July 3, 1969.

DUDLEY B. BONSAL
U. S. D. J.

10. DECISION AND ORDER ON MOTION FOR REARGUMENT

Defendants' motion for reargument is denied. The interpretation of the meaning of "salaries" sought by defendants would not change the holding that only officers were eligible for benefits under the NMU Officers' Pension Plan, for the reasons stated in the Memorandum filed May 23, 1969. Therefore the inclusion of non-officers in the Plan was not authorized by the NMU Constitution as revised in 1970. Since such inclusion was beyond the power of the defendants, plaintiffs are entitled to appropriate relief.

Consideration has been given to the affidavit of the defendant Martin Segal dated June 11, 1969, which was filed in support of the defendants' motion for reargument. Mr. Segal is one of the trustees of the NMU Officers' Pension Plan, who appeared in the action and

Thereupon after such prompting as the record shows the National Office acted to implement the authority so recently reaffirmed. It adopted a resolution based upon the desire of the National Office "to confirm the pension rights of all employees of the Union, both retroactively and prospectively." The text appears in the margin.[9]

Right then and there, having been advised in the premises, the assumed omission having been cured by NMU's

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10 (cont'd)
filed his answer on May 1, 1969. The court does not question Segal's good faith as trustee. However, the plaintiffs are entitled to obtain the return to NMU of the monies paid to the Plan on behalf of non-officers since their inclusion was not authorized.

It is so ordered.

Dated: New York, N. Y.
July 3, 1969.

DUDLEY B. BONSAL
U. S. D. J.

9 "Now, Therefore be it Resolved:

"(1) All pensions heretofore paid by the NMU Officers' Pension Plan are hereby validated and approved.

(2) All employees of the Union except (a) those already covered by collective bargaining agreements where the NMU is the employer, which collective bargaining agreements provide for the covered employees . . . shall be eligible for benefits under the NMU Officers' Pension Plan.

(3) Payments on the NMU Officers' Pension Plan to provide for the foregoing benefits are hereby authorized [and] all past payments by the Union to the NMU Officers' Pension Plan are hereby ratified and approved."

Pursuant thereto, the Plan (identified as that which was effective as of February 16, 1953, as amended) was again amended in Article I, Section 8 to define, more specifically, the term "Participant" to mean

> "an Officer, Representative, Supervisor or Professional, and all other employees of the Union except (a) any employee whose compensation, hours of work or conditions of employment are determined by collective bargaining with a recognized bargaining agent . . . ."

And Section 9 defines "NMU Constitution" to mean

> "the Constitution of the NMU in force and effect at the time of the adoption of this Pension Plan [1953] together with any amendments thereto."

District Judge should have entered summary judgment in behalf of the *defendants*, thus registering moot whatever claims had previously been urged upon the Court by these plaintiffs. To take any other view, as it seems to me, is not only to deny NMU its right to manage its own affairs,[12] but in view of the rectification of whatever oversight the Judge thought he had detected, the membership clearly restated its approval of the authority of the National Office and of the Trustees to provide pensions for all officers and all employees.[13]

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12. The Supreme Court has recognized that unions in the view of Congress are to be accorded great latitude in resolving their own internal controversies. *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 497 (1968); cf. *Wirtz v. Hotel Employees*, 391 U.S. 492, 497 (1968).

13. In applying to the documents before us principles analogous to those governing statutory construction, we are bound to read them together. Certainly repeals by implication are not favored, and no doubt can it be seen that the 1960 Constitution repealed the earlier version. Where there are two acts upon the same subject, it is fundamental that the rule is to give effect to both if possible. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

The language before us must be interpreted in the light of reason and modern thinking to reach the results intended by the NMU's Constitution and the respective Constitutions which reflect the membership approval. *Rathbun v. United States*, 355 U.S. 107, 109 (1957); cf. *United States v. Public Utilities Comm'n*, 345 U.S. 295, 315 (1953).

If caution "against a literal reading of congressional legislation" be advisable, *Local 6 v. Hotel Employees Union*, *supra* at 498, how much more should that caution be applied to the language often enough inartistically employed by the Union's draftsmen. Recognition of the [illegible] objectives sought to be achieved by NMU should provide the keystone to conciliation of all alleged doubts.

This was no case where officers of the Union were misappropriating Union funds for themselves. Cf. *Tucker v. Shaw*, 378 F. 2d 501, 506 (2 Cir. 1967); indeed, the Judge found no lack of good faith on the part of the trustees, cf. *Coleman v. Brotherhood of Railway & Steamship Clerks, Etc.*, 340 F. 2d 206, 209 (2 Cir. 1965); Hoge, the Union officers, the National Office, the NMU membership and the trustees had undertaken to do precisely what the Union sought to accomplish.

The purpose and the intent of the Union emerged conclusively, I respectfully submit, and the conferred authority was exercised.

III.

Having in mind that the District Judge concluded that summary judgment was in order, perhaps it will not be amiss to turn back to his May 23, 1969 Memorandum Decision. There he concluded that the "plaintiffs' action for breach of defendants' fiduciary duties is not barred by laches." He continued that "in this case defendants have made no showing that they have been prejudiced by the delay."

Judge Motley found in *Wirtz v. National Maritime Union of America*, 284 F. Supp. 47, 53 (1968), that the defendant Wall in the 1966 contest for National Secretary-Treasurer had defeated the plaintiff Morrissey by a vote on the order of two to one.[3] The plaintiff Padilla received the least number of votes and by about the same ratio as he sought election as one of the Vice-Presidents. These plaintiffs then had filed protests, *id.*, 57, in accordance with the provision of the Constitution, and after their protests had been heard and rejected they sought the intervention of the Secretary of Labor. They did not do so here, and it may be noticed that the Secretary is not complaining concerning the present issue,[4] although he had been kept informed through the annual filing of the reports required by the Disclosure Acts.

Now, some eight years after the actions we have been discussing, we find these plaintiffs seeking an accounting and a return of moneys contributed to the Pension Plan. It

[3] In passing it should be noted that the Internal Revenue Service had required NMU to amend the Plan so as to cover broadly *all* employees, officers, as well as non-officers. Thereupon the Plan so amended, was approved by the Bureau of Internal Revenue.

as the plaintiffs contend on brief these defendants under the judgment will be bound individually to return to NMU all moneys theretofore paid or accrued for the benefit of the intended participants; it is difficult to see why the defendants should not "have been prejudiced by the delay." Surely if this action had earlier been commenced and concluded with like result, it would seem inevitable that liability so entailed would have been limited. Moreover, corrective action, if really required, could at once have been taken to the end that the Union's concern for eligible participants be satisfied.

It seems to me that a hearing, at least on this aspect of the case, was clearly in order. I fail to see how the Judge could have faulted the defendants as having "made no showing that they have been prejudiced by the delay." To what extent that conclusion of the District Judge entered into his determination that summary judgment was in order, we do not know. But we do know that despite the absence of extrinsic evidence both on this point and with respect to what was in fact the intention of the Union, summary judgment for the plaintiffs was directed.[15] If summary judgment were not to be entered in favor of the *defendants* for the reasons previously advanced, at the very least according to my appraisal of the record here there should have been a hearing. There was error on account of that failure if for no other reason.

IV.

It would unduly protract this exposition of my views were I to go int further detail. Sounding again the note on which I opened, I respectfully submit my observations with the greatest regard for those of my colleagues and Judge Bonsal.

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15. Cf. *United States v. Diebold, Inc.*, 369 U. S. 654, 655 (1962).

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of February, one thousand nine-hundred and seventy.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,
HON. JOHN A. DANAHER,
HON. ROBERT P. ANDERSON,
Circuit Judges.

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,
Plaintiffs-Appellants,

v.

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN AND LEON KARCHMER,
Defendants-Appellants,

(AND 3 OTHER CASES).

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders and judgment of said District Court be and they are hereby affirmed in part and reversed in part and that the action be and it hereby is remanded for further proceedings in compliance with the opinion of this court with costs to be taxed against the defendants-appellants.

A. Daniel Fusaro,
Clerk.

APPENDIX H

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 33884, 33918-19, 33937

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,

Plaintiffs-Appellants,

v.

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN AND LEON KARCHMER,

Defendants-Appellants,

(AND 3 OTHER CASES).

A petition for a rehearing having been filed herein by counsel for defendants-appellants Martin Segal and Leon Karchmer,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
ROBERT P. ANDERSON,
Circuit Judges.

I vote to grant.

JOHN A. DANAHER,

March 31, 1970.

APPENDIX I

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 33884, 33918-19, 33937

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,
Plaintiffs-Appellants,

v.

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN AND LEON KARCHMER,
Defendants-Appellants,

(AND 3 OTHER CASES).

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for defendants-appellants Martin Segal and Leon Karchmer and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is
Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

March 31, 1970.

APPENDIX J

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 24th day of April, one thousand nine hundred and 70

JOSEPH M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,

Plaintiffs-Appellants,

v.

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN, AND LEON KARCHMER,

Defendants-Appellants,

(AND 3 OTHER CASES).

It is hereby ordered that the motion made herein by counsel for the appellants Martin E. Segal and Leon Karchmer to reconsider the order of the court filed March 31, 1970 denying the petition for rehearing and rehearing *in banc* be and hereby is denied.

J. EDWARD LUMBARD,

ROBERT P. ANDERSON,

Circuit Judges.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 328

MARTIN E. SEGAL and LEON KARCHMER,

Petitioners,

v.

JAMES MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THIS PETITION FOR A WRIT OF CERTIORARI

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THIS PETITION FOR A WRIT OF CERTIORARI

Statement

The respondents James M. Morrissey, Joseph Padilla and Ralph Ibrahim, individually and in their representative capacities, respectfully pray that this Court shall deny the petition of Martin E. Segal and Leon Karchmer, heretofore filed herein to review the interlocutory judgment of the United States Court of Appeals for the Second Circuit entered on February 20, 1970 in this matter.

Prior Denial

This Court, by order made on June 29, 1970, has already denied a petition for a writ of certiorari filed herein (October Term, 1969, No. 1618). There are no substantial questions raised in this petition that were not presented on the first petition.

Reference is made to respondents' brief dated June 15, 1970, for a proper statement of the previous proceedings, the questions actually presented and the respondents' statement of the case.

Reasons for Denying this Writ

I. The present petition gives no new reasons of substance why certiorari should be granted.

This petition raises substantially the same questions that were disposed of by this Court when the first petition herein was denied on June 29, 1970. Courts may test the reasonableness of an interpretation placed by union officials on the union's constitution.

II. Summary judgment should be granted when there are no issues of material fact.

Defendants moved below for summary judgment. In so doing, they recognized and represented that there were no material issues of fact for the Court to determine. Plaintiffs cross-moved for summary judgment. Defendants then attempted to create factual issues which were non-existent.

The Court denied the defendants' motion and granted plaintiffs' motion for summary judgment. The United States Court of Appeals for the Second Circuit reviewed the record and held that the District Court was correct in its finding that there were no factual issues.

III. The defendant Segal appeared, participated in the proceeding, and was fully heard in all courts below.

The defendant Segal filed an affidavit in support of defendants' motion to reargue the denial of their motion for summary judgement, and the granting of plaintiffs' motion for summary judgment. In so doing, he participated in the proceedings; he had a full opportunity to present; and, in fact, did present whatever evidence or argument he wished.

IV. The trustees, with respect to funds entrusted to them, are subject to the same fiduciary duties as are the officers.

The trustees have been entrusted with union funds. As such custodians, they are "agents" of the union and "occupy positions of trust in relation to such organization and its members as a group" [29 U.S.C. § 402 (q) and 501 (a)]. Their duties and responsibilities under the Labor-Management Reporting and Disclosure Procedure Act (29 U.S.C. Chapter 11), with respect to funds in their care, are the same as the duties and responsibilities of officers and other agents and representatives of the union. (*Tucker* v. *Shaw*, 378 F. 2d 304, 308) (2d Cir. 1967).

If such trustees may not be held to account, then the objects and purposes of the Act will be frustrated. The trustees, with custody of the fund, may be the only financially responsible source of recoupment.

V. The Court of Appeals complied with the Federal Rules of Appellate Procedure.

On March 31, 1970, the Second Circuit denied both the petition for rehearing and the petition for rehearing *en banc* by the entry of two separate orders (Appendix H,

43a; Appendix I, 44a). These two applications were made together under one cover. Judge Danaher voted on the one. He had an opportunity to vote on the other had he so desired. He abstained, obviously feeling that the question was not of sufficient importance to warrant a rehearing *en banc*. "Such a hearing or rehearing is not favored" [Rules of Appellate Procedure 35(a)].

No Judge who was a member of the panel that rendered the decision requested a vote on the question.

Conclusion

This Court has already denied certiorari herein on June 29, 1970.

This petition raises no issues justifying the attention of this Court.

This petition should be denied.

Dated: New York, New York, July 8, 1970.

Respectfully submitted,

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